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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 996

PSG Co., a corporation,
and PHILIP S. GREENBERG,
Petitioners,

vs.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Come now PSG Co., a corporation, and Philip S. Greenberg, and petition this Court for a Writ of Certiorari, seeking review of that certain decision of the United States Court of Appeals for the Ninth Circuit in the instant case, Action No. 22560 therein. The said decision has not, as of this writing, yet appeared

in the Reports. A copy of said decision is attached hereto as Appendix A.

I

JURISDICTION OF THIS COURT

The decision of the United States Court of Appeals for the Ninth Circuit was made and entered on October 1, 1969.

On November 10, 1969, the said Court denied our Petition for Rehearing. On November 18, 1969, the said Court ordered judgment stayed to December 17, 1969, pending the presentation of a Petition for Writ of Certiorari to this Court.

Jurisdiction of this Court to review the said decision by Writ of Certiorari is found in 28 U.S.C., Section 1254.

II

QUESTIONS PRESENTED FOR REVIEW

1. In commodity futures trading do lost profits constitute "actual" damages?

2. May punitive damages be recovered against a commodity futures broker because of his intentional wrongs to his customer when the actual damages consist of the type described in question 1 above?

3. Is it an abuse of discretion to refuse permission to amend a complaint prior to pre-trial where the delay in seeking amendment was due to delay and obstruction by the opponent in discovery proceedings?

Each of the above questions was answered in the negative in the decision of the United States Court of Appeals in the instant case, contrary, we believe, to the applicable decisions of this Court and of other Courts of Appeal.

III

STATUTES

There are no constitutional provisions, treaties, ordinances or regulations involved in this case.

The statutes and rules which are involved in this case are the following: (1) Rule 15(a) F.R.C.P., which directs that leave shall be freely given upon applications to amend pleadings; (2) 15 U.S.C. 13(e), that section of the Robinson-Patman Act which prohibits a broker from "bucketing", i.e., secretly taking the other side of his customer's order.

Each of the above authorities is set out verbatim in Appendix B attached hereto.

IV

STATEMENT OF THE CASE

A. In the Trial Court:

PSG Co. and Philip S. Greenberg sued Merrill Lynch, Pierce, Fenner & Smith, Inc. for wrongs committed on certain commodity futures transactions (Cl. Tr. pp. 2-4). The Complaint also alleged breach of fiduciary duties owed by the said brokers to plaintiffs

and prayed for punitive damages for willful misconduct (Cl. Tr. pp. 4-5). A jury trial was requested (Cl. Tr. p. 6).

Extraordinarily extensive and bitterly contested discovery proceedings were thereafter had over a period of approximately a year and a half, with defendant brokers stoutly resisting discovery of matters contained in its records (Cl. Tr. pp. 96-99, 554 et seq.). As a result of such discovery prior to pre-trial, plaintiffs sought to amend the Complaint by adding the charge that defendant brokers, in handling plaintiffs' account, had been guilty of violations of Robinson-Patman Act (15 U.S.C. 13(c)), in that it was guilty of "bucketing", that is, secretly taking the other side of orders plaintiffs placed with it (Cl. Tr. pp. 72, 450).

The trial Court indicates it was "impressed" with the reason for plaintiffs' late Motion to Amend arising out of defendants' obstructions to discovery (Pre-trial R. Tr. p. 28) and that plaintiffs' Motion to Amend was "not unreasonable" (Pre-trial R. Tr., p. 48). Nevertheless, the trial Court denied, at pre-trial, the Motion to Amend (Cl. Tr. p. 72).

At the trial, before a jury, the Court, during the first day of the trial, granted defendant brokers' motion to remove the issue of punitive damages from the case (Cl. Tr. p. 100).

Thereafter the trial Court, at the conclusion of plaintiffs' case, granted defendant brokers' motion to dismiss the complaint (Cl. Tr. p. 100).

B. In the Court of Appeals:

The United States Court of Appeals determined that there was sufficient evidence to entitle plaintiffs to go to the jury on the question of liability, that is, there was sufficient evidence of wrongs to plaintiffs by the broker (Opinion, p. vi).

The Court of Appeals, however, further ruled as follows:

(1) That evidence of plaintiffs' damages resulting from these wrongs was "speculative" rather than "actual" and that, therefore, reversal was not required (Opinion, p. vii).

(2) The Court of Appeals held that, since there was no evidence of "actual" damages, punitive damages could not be allowed, and that, therefore, the action of the trial Court in eliminating the issue of punitive damages early in the trial was not reversible error (Opinion, p. viii).

(3) Finally, the Court of Appeals held that the refusal of the trial Court to permit amendment of the complaint was not an abuse of discretion.

Plaintiffs-Appellants PSG Co. and Greenberg, petitioned for a rehearing on the point of damages, which said petition was denied.

As is discussed under the heading of "Argument" in this petition, we respectfully submit that the decision of the Court of Appeals on the above three points is contrary to applicable decisions of this Court and of other United States Courts of Appeals. For

this reason, we here seek review of said decision by the instant petition for Writ of Certiorari.

V

JURISDICTION OF THE TRIAL COURT

Jurisdiction in the first instance in the trial Court is found in 28 U.S.C. 1332, upon allegations of the complaint (Cl. Tr. p. 1) that plaintiffs are an Oregon corporation and Oregon citizen suing a Delaware corporation, with the amount in controversy exceeding the sum of $10,000.00, exclusive of interest and costs.

VI

ARGUMENT

A. ACTUAL DAMAGES

As noted above, the decision of the United States Court of Appeals holds, as a matter of law, that the evidence of damages suffered by plaintiffs, petitioners here, was speculative rather than actual and, therefore, not recoverable.

The decision of the United States Court of Appeals cites as its authority the decision of this Court in *Anderson v. Mt. Clemens Pottery Co.*, 1945, 328 U.S. 680, 688. We respectfully but earnestly submit that the said decision of this Court in the *Anderson v. Mt. Clemens Pottery Co.* case does not support the decision of the Court of Appeals in the instant case but is, in fact, authority for a contrary determination.

This Court said in the *Anderson* case, at the cited page as follows:

> "Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.' *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 US 555, 563, 75 L ed 544, 548, 51 S Ct 248. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages."

To the same effect, see: *Bigelow v. RKO,* 327 U.S. 251; *Espillat v. Berlitz* (U.S. Ct. of App., D.C.) 383 F.2d 220, 222; *Standard Machinery v. Duncan* (1st Circ.) 208 F.2d 61, 65; *Package Closure Corp. v. Sealright Co.* (2nd Circ.) 141 F.2d 972, 979; *Blackburn v. Aetna* (3rd Circ.) 368 F.2d 345, 348; *Thompson v. Brotherhood of Sleeping Car Porters* (4th Circ.) 367 F.2d 489, 493; *Robey v. Sun Record Co.* (5th Circ.) 242 F.2d 684, 690; *Riverside Coal v. United Mine Workers* (6th Circ.) 410 F.2d 267, 274; *Hannigan v. Sears, Roebuck* (7th Circ.) 410 F.2d 285, 293; *NLRB v. Kartarik Inc.* (8th Circ.) 227 F.2d 190,

193; *Hunt Foods v. Phillips* (9th Circ.) 248 F.2d 23, 33; *Vanguard Ins. Co. v. Connett* (10th Circ.) 270 F.2d 868, 870.

The fact that plaintiffs were damaged in some amount is inescapable: They were in a tremendously long position in a falling market (T. 190, 191), unable to protect themselves for a number of days, with even liquidating orders refused by their sole broker. If there be some question as to the precise extent of the actual damages here, though this is not conceded, the cited authorities would permit recovery here.

The evidence of plaintiffs' actual damages in the instant case was as follows, bearing in mind that the trial Court took the case away from the jury, and that therefore all inferences favor plaintiffs: Had defendant brokers taken plaintiffs' orders, as it should have done, plaintiffs would have been entitled to demand the payment of some $45,000.00 cash, profits on the said orders, some six days after the orders were wrongfully refused (Ex. 75). The period of time involved was the time required by plaintiffs to secure another broker to end the damages by placing protective orders (R. Tr. pp. 56-65). This sum was not "book value", as it is characterized in the decision of the Court of Appeals, but was cash plaintiffs were entitled to draw from their account with defendant brokers (R. Tr. pp. 11-15).

Unlike stock transactions, in commodity futures transactions, each day the accounts of the broker are settled and liquidated at the Exchange's Clearing House; where that day's market value of the contracts

held by the broker (for his customer) increases over the margin requirements, actual payments of cash are made by the Clearing House to the broker, without any sale of the contracts having occurred (see Ex. 59, 149, By-Laws and Rules, New York Coffee and Sugar Exchange, Inc., Section 12 of the By-Laws of the New York Clearing Association, pp. 380, 381. See also *Bear & Saxon, Commodity Exchanges and Futures Trading,* p. 174; *In re Rosenbaum,* 112 F.2d 315, 317.

Thus, monies received by the broker from the Clearing House are in turn each day payable on demand by the broker to his customer less, of course, the broker's commissions and margin requirements (R. Tr. pp. 10-15). In other words, no sale or "liquidation" at all is involved in the day by day actual payments of profits or losses between the broker and his customer; actual payments to or from the customer are made each day, on demand, simply on the basis of daily market fluctuations. See *Volkart v. Freeman,* 311 F.2d 52, 55.

The decision of the Court of Appeals notes the absence of evidence as to whether the ultimate liquidation of the various contracts involved here resulted in any loss to plaintiffs (petitioners here). We respectfully submit that the ultimate liquidation price is largely irrelevant to the wrong involved here. For example, the testimony showed (R. Tr. pp. 231, 232) that one of the wrongfully refused contracts was not "liquidated" until February, 1966, many months after the termination of the wrong complained of. Obvi-

ously, the price realized in February, 1966, bears little relation to the circumstances existing at the time of the wrong, October, 1965, for market conditions fluctuate repeatedly day by day in the commodity futures business (R. Tr. p. 237).

In the instant case, plaintiffs sought and proved damages only for the period of six market days from the date of the wrongful refusal by Merrill Lynch, Pierce, Fenner & Smith, Inc. to accept their liquidating orders to the first date they could place orders with another broker (R. Tr. pp. 266-267).

The fact that plaintiffs at the time of ultimate "liquidation" of the subject orders, many months later, suffered a loss or enjoyed a gain, in no way affects the *fact* that defendant brokers would have been required to pay to plaintiffs some $45,000.00 had they taken plaintiffs' orders as they should have. In other words, the intermediate payments from broker to customer, or vice versa, depending upon daily market fluctuations, are payable irrespective of the ultimate liquidation of the subject contract.

We respectfully submit that the evidence of the foregoing facts which were introduced in the trial of this case *compels* the conclusion that plaintiffs' damages were real, indeed. Such damages, we submit, fall clearly within the language quoted above from the decision of this Court in *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 688.

The law in Oregon is consonant with the above quoted language of this Court in the *Anderson* case.

See *Solo-Lite v. Allen,* 223 Ore. 80, 353 P.2d 843; *Nelson v. Harner,* 191 Ore. 359, 230 P.2d 198.

B. PUNITIVE DAMAGES

The decision of the Court of Appeals holds (p. 6) that, since no "actual" damages were proven, the action of the trial Court in barring evidence pertinent to punitive damages early in the trial did not constitute reversible error.

We concede that it is the law in Oregon that punitive damages may not be awarded where there are *no* actual damages. We respectfully submit, however, that it is incontrovertible that plaintiffs did suffer *some* damages in the instant case, as is discussed under the heading of "actual" damages, supra. This is so regardless of whether the evidence offered in the trial Court precisely measured plaintiffs' damages or not, and it is also true regardless of whether plaintiffs ultimately suffered a loss or enjoyed a gain on the ultimate disposition of their orders many months after the wrong complained of. Plaintiffs were entitled to their profits one week after the wrongs *regardless* of the ultimate liquidation figure. In commodity transactions, the two are separate incidents.

We therefore respectfully submit that the decision of the Court of Appeals conflicts in the same way on this point with the decisions of this Court and other Courts of Appeal cited above.

C. ROBINSON-PATMAN ACT VIOLATION

Under this heading, the decision of the Court of Appeals affirms the action of the trial Court denying plaintiffs' motion to amend their complaint with the following language:

> "Where, as here, a motion to amend is made —nineteen months after the complaint had been filed and served and about one month before trial was set to begin—and where an entirely new and different cause of action, involving complicated legal and factual issues requiring extensive discovery and preparation for trial, is alleged—we can find no abuse of discretion, particularly where the trial court's action does not bar a separate action." (Decision, p. ix).

The said decision of the Court of Appeals cites (p. 7) two of its earlier decisions as authority: *Caddy-Imler Creations, Inc. v. Caddy,* 299 F.2d 79 and *Hancock Oil Co. v. Universal Oil Products Co.,* 120 F.2d 959. In the first of these cases, permission to amend was sought to change the entire legal theory of the case after the introduction of all of the evidence was complete! In the second, permission to change pleadings was denied because it was shown that the moving party had knowledge of the changes long before it sought leave to amend, and the ruling was upheld upon this ground.

Neither of such precedents, we submit, bears any resemblance to the instant case. Here, movant, *more than a month before pre-trial* (Cl. Tr. p. 434), sought to enlarge their case as a result of facts established just shortly before from defendant's own records;

defendant had resisted discovery proceedings so extraordinarily that plaintiffs could not have raised the issue sooner (Pre-Trial Rep. Tr. p. 24 et seq.). This latter was not controverted. See docket entries re plaintiffs' attempts at discovery and defendant's resistance thereto, as shown at Cl. Tr. p. 544, et seq.

It was conceded at pre-trial that defendant corporation has a wholly-owned subsidiary corporation in Panama which, in turn, has a wholly-owned subsidiary corporation in Switzerland which, in turn, has a wholly-owned subsidiary in Britain (Cl. Tr. p. 59). Plaintiffs sought to prove that through this chain of subsidiaries, defendant was acting as a concealed principal in taking the other side of plaintiffs' orders, and that the facts supporting these charges had been discovered only shortly before pre-trial because of defendants' extraordinary efforts in resisting discovery as to its records (Pre-Trial R. Tr. pp. 24-36).

Neither side was pressing for trial (Pre-Trial Rep. Tr. p. 45).

No continuances of trial had previously been sought by plaintiffs but defendant had been granted a continuance for the convenience of its employees who were on vacation (Pre-trial Rep. Tr. p. 25).

VII

CONCLUSION

We respectfully submit that the decision of the Court of Appeals on this point is in direct conflict with the mandate of this Court in *Foman v. Davis*, 371 U.S. 178, 182, as well as its own decisions in *Rosenberg v. Arnold*, 283 F.2d 406, *Northwest v. Gorter*, 254 F.2d 652.

Dated, San Francisco, California,
December 19, 1969.

Respectfully submitted,
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SULLIVAN, ROCHE & JOHNSON,
GERALD J. O'CONNOR,
Of Counsel.

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

PSG Co., a corporation, and PHILIP S. GREENBERG, *Appellants*, vs. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *Appellee.*	No. 22,560

[October 1, 1969]

Appeal from the United States District Court
for the District of Oregon

Before: Hamley and Browning, Circuit Judges,
and Real, District Judge*

Real, District Judge:

PSG Co., an Oregon Corporation, and Philip S. Greenberg (hereinafter referred to jointly as appellant) filed a complaint against Merrill, Lynch, Pierce, Fenner & Smith, Inc., a Delaware corporation, for breach of an alleged agreement to accept appellant's business of buying and selling commodity futures contracts up to a maximum of 300[1] contracts open, praying judgment in the amount of $45,221.68 and

*Honorable Manuel L. Real, United States District Court for the Central District of California, sitting by designation.

[1]An account limit is the number of futures contracts a broker will carry on margin at any one time.

punitive damages for willful, wanton and malicious conduct. Two other causes of action were alleged which do not concern us here since they were settled at the time of trial.

Jurisdiction of the federal district court was based on 28 U.S.C. § 1332(a) (diversity). Our jurisdiction on appeal is based on 28 U.S.C. § 1291.

BACKGROUND

PSG Co., an Oregon corporation, is wholly owned by Philip S. Greenberg. Since 1963, appellant has been engaged in the business of buying and selling commodity futures contracts. Appellee is a member of the New York Stock Exchange and the principal commodity exchanges in the United States, London and world markets. As a broker, appellee places orders received from its customers for the purchase and sale of futures contracts on the exchanges where they are traded.

In 1963, appellant opened accounts with appellee for the placing of orders of purchase and sale of commodities on margin. At that time appellee informed appellant of account limits and these were revised from time to time until, in 1965, the limits of appellant's combined accounts were 100 contracts straddled[2] and 100 contracts open.[3]

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[2]A contract is straddled when there are offsetting positions of short and long, i.e., if a person is in a long position on 100 contracts and in a short position of 50 contracts, the result would be 50 contracts straddled and 50 contracts net long or open.

[3]An open contract is an incomplete position in which the long or short position has not been covered by a corresponding sale or purchase of the commodity being traded.

By October 22, 1965 appellant held with appellee 587 sugar contracts, with 207 contracts open. At 6:15 A.M. on October 22, 1965 appellee notified appellant that it would receive liquidating orders only from appellant with a limit of only 100 contracts open.

Suit then followed in the United States District Court—the appellant claiming—that appellee had agreed to accept appellant's business up to a maximum of 300 contracts open at any one time—that appellee's action was without prior notice—that as a result appellant was damaged in the sum of $45,821.68—and that appellee's conduct was a breach of a fiduciary duty appellee owed to appellant entitling appellant to $500,000.00 in punitive damages.

After the first day of trial, appellee moved to remove the issue of punitive damages from the case. This motion was granted by the trial court.

This appeal is concerned only with (1) the propriety of granting a motion for directed verdict[4] as to appellant's first cause of action for breach of alleged agreement, (2) removal of the issue of punitive damages, and (3) failure of the trial court to permit appellant to amend the complaint to state a cause of action for violation of the Robinson-Patman Act.

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[4]Although denominated a motion to dismiss, the action of the trial judge was entirely consistent with the consideration and granting of a motion for directed verdict and our consideration is on consideration of substance—not form. *Wolf v. Reynolds Electrical & Engineering Co.*, 9th Cir. 1962, 304 F.2d 646; *Johnson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 9th Cir. 1968, 400 F.2d 968; *Fruit Industries Research Foundation v. National Cash Register Co.*, 9th Cir. 1969, 406 F.2d 546.

MOTION FOR DIRECTED VERDICT

At trial appellant maintained that appellee was bound to handle all its business up to 300 contracts open and that before appellee could reduce these trading limits it had to give appellant reasonable notice.[5]

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[5]Appellant has advanced two different theories during various stages of the proceedings in support of this contention. In the complaint and in the pretrial order, appellant urged a straight contract theory; i.e., that in January and August, 1963, Greenberg and PSG Co., respectively, entered express agreements establishing credit and trading accounts with appellee for the purchase and sale on margin of commodity future contracts on domestic and foreign commodity exchanges of which appellee was a member; that the agreements provided for certain margin requirements and trading limits (the maximum amount of open contracts which plaintiffs could have at any one time); that these trading limits were occasionally revised upwards; that in March, 1965, the trading limits were set at 300 contracts open and the margin requirements were set at $125 per contract open and $63 per contract straddled; and that it was understood and agreed by both parties that in the event appellee wished to cancel or modify the trading limits or margin requirements, it would give appellant reasonable notice before doing so. At trial appellant abandoned the contract theory, conceding that there was no written agreement (Record, vol. 2, at 93) and no quid pro quo offered by way of bilateral promise (Record, vol. 3, at 251), and switched to a theory of promissory estoppel. Record, vols. 2 & 3, 123-127, 250-251. By this latter theory appellant contends appellee promised him that he would handle all of appellant's business up to 300 contracts open; that appellant built up his position in reliance on this promise; and that it was understood, by both parties at the time appellee made this promise that the trading limits would not be unilaterally changed by appellee without giving reasonable notice to appellant. On appeal, appellant asserts both theories, now asserting, apparently for the first time, that the consideration for appellee's March, 1965 oral promise was appellant's commitment of all its commodity trading business to appellee and the knowledge by appellee that it would take a number of trading days before appellant could switch brokers in the event appellant should deem such a switch necessary or desirable. We need not decide the question of whether appellant can now reassert his contract theory—expressly abandoned at trial—since the trial court ruled that a binding promise was made by appellee to handle all of appellant's business up to

In ruling upon the motion for directed verdict, the trial court found that a promise was made by appellee to handle all of appellant's business up to 300 open[6]—that appellant built its position in reliance on this promise—and that this promise could be terminated by appellee in accordance with the custom of the trade.[7] The trial court then granted the motion on the ground that the appellant had failed to produce any evidence that the contract was terminated contrary to the custom of the trade.

While it is doubtful that appellant or its witnesses established that there was a custom within the commodity business for a brokerage firm to give advance notice of a change in limits, there was ample testi-

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300 open. This is the maximum that could have been achieved through appellant's contract theory, since the understanding or agreement that appellee would not reduce appellant's trading limits without reasonable notice—advanced in both theories—was based solely on an alleged custom of the trade and not on any oral or written statement to that effect by either party. Record, vol. 2, 92.

[6]The trial court based this finding on the following two excerpts from Mr. Greenberg's testimony concerning conversations he had with officers or representatives of appellee: (1) "Subsequently, about, I would say a month or two later, sometime in late March-early April, I saw that I was going to have to have 300 lots or 15,000 tons of sugar was going to be needed to bring into Guatemala. I went to Mr. Dulong and Mr. Emlaw, and we discussed it fully; and in a matter of a day or two or three days, they came back and said, 'Fine. We will handle it. We'll take care of you. We'll take delivery for you, and your limits are 300 open.'" Record, vol. 2, at 29, 31-32. (2) "I said, 'Fine.' He asked me if Portland was taking good care of me, and I said, 'Yes.' He asked me if my limits of 300 were satisfactory. I said, 'Yes, they were.' And he said, 'Fine,'" Record, vol. 2, at 41.

[7]Record, vol. 3, at 269-270. In Oregon, as elsewhere, custom may be used to interpret an ambiguous contract, but before it can be used, it must be shown that the custom was known to the parties, or was so generally known that the parties may be presumed to have known of it and to have contracted with reference to it. *Smith v. Abel*, 1957, 211 Or. 571, 316 P.2d 793, 804.

mony in the record that upon reduction of trading limits it was the custom in the trade to give a customer reasonable time to liquidate his position.[8] Evidence before the trial court indicated that on October 22, 1965 appellee gave appellant oral and written notice that it would thereafter accept only liquidating orders. Appellant testified, however, that appellee refused a number of liquidating orders placed by appellant. This evidence raised factual questions and should have been submitted to the jury. If this ground alone supported the grant of the motion for directed verdict, reversal would be required.

The trial court in granting the motion for directed verdict was convinced that the damages which were attempted to be proved were speculative. We agree.

Although appellant introduced evidence its book value of contracts would have increased had its orders been honored, there was no evidence introduced that the actual liquidation of these orders resulted in any loss. Appellant's financial loss is the ultimate measure of his damage. Damages cannot be based on speculation or guesswork.[9] *Anderson v. Mt. Clemens*

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[8]Record, vol. 2, at 132, 193, 211-215. In ruling on the motion to dismiss, the trial judge remarked that it was the custom of the trade "that when the limits are reduced, a reasonable amount of time is given to liquidate." Record, vol. 3, at 269.

[9]Appellant does not contest this proposition, but rather asserts that it isn't necessary for a customer whose order has been wrongfully refused to actually place that order again before he can show damages. This proposition may be correct, but only if damages can be shown by means other than by showing that the customer subsequently placed his order and suffered a loss. Cases cited by appellant are inappropriate either because the court specifically held there was evidence of damages in the case (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Miller,* 1966,

Pottery Co., 1945, 328 U.S. 680, 688; *Smith v. Abel*, 1957, 211 Or. 571, 316 P.2d 793, 802; *Cf. James Wood General Trading Establishment v. Coe*, 2d Cir. 1961, 297 F.2d 651; see also Restatement (Second) of Agency § 400, comment b (1958). In the absence of any evidence that appellant suffered any actual damage as a result of appellee's failure to accept liquidating orders, we conclude that the trial court properly directed a verdict for appellee at the close of appellant's case.

PUNITIVE DAMAGES

Generally a suit or action upon a contract will not afford an opportunity for recovery of punitive damages. *Weaver v. Austin*, 1948, 184 Or. 586, 200 P.2d 593, 600; *Brown v. Coates*, D.C. Cir. 1958, 253 F.2d 36, 39; 5 Corbin, Contracts, § 1077. Since the relationship of agent and principal arises out of contract, before punitive damages can be awarded there must be shown a breach of fiduciary duty independent of the cause of action for breach of contract. *Harper v. Interstate Brewery Co.*, 1942, 168 Or. 26, 120 P.2d 757.

Appellant alleged an intentional malicious breach of fiduciary duty motivated by self-interest at the expense of the principal. We cannot conjecture any

401 S.W.2d 645, 648-649), or the stock was sold after the broker refused to sell, revealing actual damages conveniently measured by the difference between the bid figure at the time of the order and the amount the customer finally realized for his shares (*Opper v. Hancock Securities Corporation*, S.D.N.Y. 1966, 250 F. Supp. 668, *aff'd*, 367 F.2d 157; *Sadtler v. Orten*, 1932, 161 A. 490, 492), or because damages were obvious from the factual context of the case (*Mekrut v. Gould*, 1959, 188 N.Y.S.2d 6, 9-10). The case of *James Wood General Trading Establishment v. Coe, S.D.N.Y.* 1961, 191 F. Supp. 330, was reversed on appeal, 297 F.2d 651.

failure of proof of those allegations since the trial court ruled early that the issue was removed from the case. Had the trial court allowed evidence on exemplary damages, it may well have concluded, at the close of appellant's case, that the issue of whether the breach of contract merged with a breach of a fiduciary duty and formed an intentional tort for which punitive damages could be allowed should have been submitted to the jury. In Oregon, however, in order to recover exemplary damages there must be actual damage shown. Exemplary damages can never constitute the basis for a cause of action. *Martin v. Cambas,* 1930, 134 Or. 257, 293 P. 601; *Weaver v. Austin,* supra; *Lundgren v. Freeman,* 9th Cir. 1962, 307 F.2d 104, 119 n. 13. Appellant having failed in its proof of actual damage, there is no reversible error in eliminating proof of exemplary damages in this case.

ROBINSON-PATMAN ACT VIOLATION

Appellant claims that the trial court erred in not permitting it to amend its complaint to state a cause of action under the Robinson-Patman Act [15 U.S.C. § 13(a)].

Allowance of amendments after a responsive pleading has been served is within the sound discretion of the trial court. Fed. R. Civ. P. 15(a); *Caddy-Imler Creations, Inc. v. Caddy,* 9th Cir. 1963, 299 F.2d 79; *Hancock Oil Co. v. Universal Oil Products Co.,* 9th Cir. 1941, 120 F.2d 959; *Kaplan v. United States,* C.D. Cal. 1967, 42 F.R.D. 5.

Where, as here, a motion to amend is made—nineteen months after the complaint had been filed and served and about one month before trial was set to begin—and where an entirely new and different cause of action, involving complicated legal and factual issues requiring extensive discovery and preparation for trial, is alleged—we can find no abuse of discretion, particularly where the trial court's action does not bar a separate action.

Affirmed.

Appendix B

Rule 15(a) F.R.C.P.:

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

15 U.S.C., Section 13(c):

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 996

PSG Co., a corporation, and PHILIP S. GREENBERG,
Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

STATEMENT OF THE CASE

Respondent ("Merrill Lynch") deems the statement of the case by petitioners ("Greenberg") to be inaccurate and incomplete and the brief of Greenberg to improperly argue the merits, rather than to present the legal questions as required when seeking a writ of certiorari from this court. Merrill Lynch is compelled, therefore, to make the following statement:

A. In the Trial Court

This is an action for breach of an alleged contract to accept Greenberg's orders to purchase or sell commodity futures contracts, on margin, up to a

maximum of 300 "open" contracts. (R. 61, 62)[1] Greenberg claimed that by reason of Merrill Lynch's refusal to accept orders for new transactions, he was prevented from making profits on the transactions, and that Merrill Lynch's conduct in terminating the agreement was such as to entitle him to recover exemplary damages. (R. 62)

Nineteen months after the action had been filed, and little more than a month before the date set for trial, Greenberg moved to amend his complaint to assert alleged violations of the Robinson-Patman Act, 15 USC, Sec. 13(c). (R. 450) At the same time, Greenberg filed numerous and complex interrogatories directed at such issues. (R. 437-449)

---

1. At this late stage, it should be clear that this is an action for breach of an express contract, and not for vague "wrongs committed" on commodity futures transactions, as Greenberg states in his petition. (Greenberg's Petition, p. 3)

The trial court denied Greenberg's motion to amend on the ground that the new claim Greenberg sought to include by amendment would greatly complicate the issues, that it constituted a separate claim not related to the issues to be tried, that Greenberg proposed to initiate extensive discovery on the new claim at a late stage in the course of the proceedings, and that the late amendment and discovery proceedings would require a postponement of trial, which in turn would require postponement of another major case already scheduled for trial in which Greenberg was a defendant. (Pretrial Tr. 26-28, 46-48)

At trial, the court granted Merrill Lynch's motion to dismiss on the ground that there had been no probative evidences adduced of breach of any agreement, and further that the evidence of damages based on loss of future profits was purely speculative.

B. In the Court of Appeals

As Merrill Lynch reads the decision, the United States Court of Appeals for the Ninth Circuit affirmed the trial court's ruling that Merrill Lynch had no continuing obligation to act as broker for Greenberg in the purchase of new commodity contracts not already held in his margin account; but ruled that Merrill Lynch had an obligation to act as broker in the disposal or "liquidation" of contracts presently held in Greenberg's account. However, the Court of Appeals affirmed the trial court's ruling that the evidence that Greenberg had suffered any damage was speculative and insufficient to require submission of the case to the jury, in that there was no evidence introduced to show that Greenberg actually lost profits or that liquidation of his contracts resulted in a loss. The Court of Appeals

refused rehearing on a petition devoted solely to the question whether the damages Greenberg had sought to recover were speculative.

II

ARGUMENT

CERTIORARI SHOULD NOT ISSUE IN THIS CASE BECAUSE THERE ARE NO SUBSTANTIAL QUESTIONS PRESENTED FOR REVIEW

A. Greenberg's petition seeks to obtain further review of a question of fact.

A review of a decision of a court of appeals on writ of certiorari will be granted only where the petitioner shows that there are important questions of law presented, involving a conflict between the decision of the court of appeals and this court, or other circuit courts of appeal.

Rule 19, Rules of the Supreme Court of the United States

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial

discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Greenberg's petition presents no issue within the guidelines of Rule 19 for consideration by this court. The trial court ruled that the evidence Greenberg

presented in support of his claim for damages for lost profits was speculative and insufficient to raise a question for the jury. The Court of Appeals affirmed on that ground, and denied a petition for rehearing on that issue.

This court, as a court of law rather than a court for the correction of errors in fact finding, will not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

> Graver Tank & Mfg. Co. v. Linde Air Prod. Co. (1949) 336 US 271, 93 L ed 672 (adhered to on rehearing, 339 US 605, 94 L ed 1097)
>
> Berenyi v. Immigration Service (1967) 385 US 630, 17 L ed 2nd 656, 661

For the same reason, this court will not undertake to review concurrent rulings by the two courts below that the evidence was insufficient to present a jury question.

Houston Oil Co. v.
Goodrich (1918)
245 US 440, 62 L ed 385

Greenberg argues in his petition that the Court of Appeals decided a question of law in conflict with decisions of other federal courts. In furtherance of the argument, he cites one case from this court and one case from each of the eleven courts of appeal wherein it was held, under the fact situation presented in the particular case, that the evidence of damages was not too speculative to prevent submission of the case to the jury. None of the cases cited involve a claim for damages for breach of a contract to purchase or sell stocks or commodities contracts. Instead, they involve such diverse subject matter as antitrust proceedings, claims for wrongful death, fraud and other tort claims. Further, none of the cases cited enunciate a rule of law different from that

relied upon by the two courts below in this case, but simply hold that, under the particular facts presented, the evidence was not too speculative.

The fallacy in the argument that the decision in this case is in conflict with the decisions of other federal courts on a point of law is pointed up by the fact that cases can be found from each circuit holding that, under the evidence presented in the particular case, there was insufficient evidence to require submission of the case to the jury.[2] Thus,

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2. See, e.g., James Wood General Trading Establishment v. Coe (2d Cir 1961) 297 F2d 651; Washington Sand & Gravel Co. v. Brann & Stuart Co. (3d Cir 1947) 162 F2d 826; Polar Steamship Corp. v. Inland Overseas S. Corp. (4th Cir 1943) 136 F2d 835, cert. denied, 320 US 774; Camilla Cotton Oil Co. v. Spencer Kellogg and Sons (5th Cir 1958) 257 F2d 162; Baumer v. Franklin County Distilling Co. (6th Cir 1943) 135 F2d 384, cert. denied, 320 US 750; Classic Bowl, Inc. v. A M F Pinspotters, Inc. (7th Cir 1968) 403 F2d 463; Terre Haute Brewing Co. v. Dwyer (8th Cir 1940) 116 F2d 239; Putnam v. Lower (9th Cir 1956) 236 F2d 561. For another recent Oregon decision, see DeCicco v. Uniroyal, Inc. (D.Or.1968) 293 F Supp 1190.

it is clear that whether the evidence of damages is too speculative to require submission of the case to the jury is a question of sufficiency of the evidence to be determined in each individual case.

Among the decisions from other courts of appeal holding that evidence of damages was too speculative is

James Wood General Trading Establishment v. Coe (2d Cir. 1961) 297 F2d 651

which is relied on, among other authorities, by the Court of Appeals in the instant case.3 In the James Wood case, a customer brought an action against stockbrokers for alleged breach of contract to sell a particular stock when the price went above $58 per share. On the question of damages, the court remarked (p. 658):

---

3. Greenberg had relied on the trial court's decision in the James Wood case in his briefs in the Court of Appeals, but had neglected to inform the Court of Appeals that the case had been reversed on appeal. The Court of Appeals pointed this matter out in footnote 9 of its opinion.

"However, even assuming Moretti had forgotten the instructions as given, and that he exercised no discretion whatever, it is difficult to find in this record any evidence of damage. What proof can there be that, if Moretti had not forgotten the instructions, he would have sold the stock on July 25 or 26, 1957, at 58 1/8 or any other price? How can such a conclusion be arrived at other than by the merest guesswork and speculation? The plain fact is that, in the circumstances of this case there is and can be no evidence of any probative value to support a finding that he would have sold. On the contrary, there is substantial evidence to support an inference that he would not have sold the B & O at the prices prevailing in the market on July 25 and 26, 1957.

"Damages cannot be based on speculation. The difficulty of measuring and appraising the amount, once it is clear that actual damage has been sustained, is another matter. Where, as here, the existence of any damage whatever would have to be a matter of guesswork, no recovery is allowed (citations omitted).

"Where actual damage depends on an exercise of discretion, and there is no evidence from which it can reasonably be determined how such discretion would be exercised, no damages are recoverable (citations omitted)."

The law of Oregon also is to the effect that damages cannot be based on speculation.

Weaver v. Austin (1948)
184 Or 586, 601, 200 P2d 593

Western Rebuilders, Inc. v.
Felmley (1964) 237 Or 191,
203, 386 P2d 813, 391 P2d 383

In summary, a writ of certiorari should not issue in this case, because the question presented for consideration is the correctness of the trial court's ruling on a question of sufficiency of evidence, and not a question of law. That ruling was affirmed on appeal and on petition for rehearing. Greenberg has had his day in court, and the Court of Appeals, which is the court designed to review allegations of error as to determinations of fact, has upheld the trial court. This court's time should not be taken up with further arguments as to the sufficiency of the evidence.

B. The decisions of the two courts below are correct.

The question presented by Greenberg's petition for writ of certiorari is whether there was sufficient evidence to require submission of this case to the jury. Apart from the question whether the case involves legal issues of a kind this court should review, it is clear that the two lower courts were correct.

Greenberg asserts that in commodity futures transactions, where because of market action the value of the contracts held by the broker for a customer increases over margin requirements, the excess may be withdrawn by the customer; that, had Merrill Lynch accepted Greenberg's orders, the value of the contracts at a given date selected by Greenberg would have exceeded the required margin; and that the excess "cash" Greenberg was "entitled to withdraw" from his accounts constituted profits

Greenberg lost when Merrill Lynch refused to accept his orders.

The error in Greenberg's argument is apparent when all the facts concerning obligations between broker and customer are considered. A broker's customer is entitled to withdraw money from his account when it becomes "overmargined" by appreciation of the value of the contracts. He is also required, however, to put up or pay to the broker additional money when his account is "undermargined." Because the market fluctuates constantly, it is impossible to determine whether a profit or loss has ultimately been made on the purchase of a commodity contract until the contract has been disposed of and it has been determined whether customer withdrawals exceeded amounts required to maintain margin. Thus, until the transaction has been completely closed out by sale of the commodity con-

tract, the question whether its purchase would have been profitable is necessarily based on speculation. There can be no "profit" on a transaction until a final sale is made, and Greenberg did not claim he would have sold the contracts in question on the date chosen for valuation. If Greenberg had not made a sale or disposal of the contract, of course, the temporary paper profit never would have been realized, and if not realized by a sale would have disappeared immediately as the market began to swing against Greenberg. The fact is, as the court below noted, Greenberg arbitrarily selected the one day on which the contracts showed a paper appreciation as the date to "value" the contracts. (Tr. 270) Valuation on other dates would have shown a loss.

In this connection it is important to note that there was no evidence that

Greenberg would have suffered any loss if he had later actually replaced his orders for the same contracts with his new broker, because there was no evidence that the contracts were not available at the same prices at a later date. In fact, Greenberg could have purchased the same contracts through his new broker at a more favorable price, because, as mentioned above, the market immediately turned and dropped below the prices at which he claimed he should have been able to purchase the contracts through Merrill Lynch. (Ex. 180)

Damages for lost profits are ordinarily shown by evidence of profitable past operations.

> Mercury Cleaning Systems v. Manitowoc Eng. Corp. (7th Cir 1958) 255 F2d 318

In the instant case, Greenberg had steadily lost money, and could not provide such evidence. The new theory of damages he sought

to assert in place of evidence of profitable operation was without rational or factual justification, and the two courts below properly held that the case should not be submitted to a jury.

C. The trial court's order striking Greenberg's claim for exemplary damages does not present a ground for reversal.

During the course of trial, the court withdrew Greenberg's claim for exemplary damages from the case.

The trial court believed that there was no evidence presented or to be presented in this case of malicious conduct attending the alleged breach of contract which could provide a basis for an award of exemplary damages. (Tr. 107-113)

The court's ruling was based on Oregon law that exemplary damages may not be awarded for breach of contract. See,

Weaver v. Austin
(1948) 184 Or 586,
200 P2d 593

Smith v. Abel et al
(1957) 211 Or 571,
316 P2d 793

The Court of Appeals affirmed the trial court's ruling on the ground that Oregon law requires that there be an award of actual damages before exemplary damages can be recovered, and exemplary damages cannot constitute the basis for a cause of action. See,

Martin v. Cambas
(1930) 130 Or 257,
293 P 601

Weaver v. Austin
(1948) 184 Or 586,
200 P2d 593

As Greenberg failed to prove any actual damages, the issue as to exemplary damages is moot.

In his argument in this court, Greenberg concedes that it is the law in Oregon that exemplary damages may not be awarded where there are no actual damages.

As Greenberg's claim for exemplary damages presents no ground for reversal, it need not be considered by this court as ground for review on petition for writ of certiorari.

D. The trial court correctly denied Greenberg's motion to amend the pleadings to add a new and unrelated cause of action.

In August, 1967, 19 months after the case had been filed and a little more than a month before the date set for trial, Greenberg moved to amend his complaint to assert alleged violations of the Robinson-Patman Act, 15 USC, Sec. 13(c). (Record 450) At the same time, Greenberg filed numerous interrogatories. (Record 437-449) The trial court denied the motion to amend, for the reasons stated at pages 2-3 of this brief.

The Court of Appeals affirmed the action of the trial court on the ground that it is not an abuse of discretion to

refuse a late motion to amend, where such motion would introduce an entirely new and different cause of action, involving complicated legal and factual issues, and require extensive discovery and preparation for trial.

The allowance of a motion to amend is discretionary and the trial court clearly did not abuse its discretion in this case. In the cases where the trial court's denial of a motion to amend has been held to be an abuse of discretion, the proposed amendment merely stated an alternative theory, based on the same operative facts, or added some fact necessary to state a complete cause of action. In most of the cases, the complaint had been dismissed for failure to state a claim on which relief could be granted and the plaintiff would have been out of court if the amendment had not been allowed. Thus, the trial court's refusal to allow an amendment to cure an imperfectly

stated claim where a genuine claim exists may legitimately be considered an abuse of discretion and require reversal because the plaintiff is left without remedy. None of those circumstances are present in the instant case, as the new amendment did not seek to cure or add to the old claim, but constituted a new and independent claim. See,

> Suehle v. Markem Machine Company (ED Pa. 1965) 38 FRD 69
>
> Portsmouth Baseball Corp. v. Frick (SDNY 1958) 21 FRD 318

Even assuming, arguendo, that the trial court erred in refusing to allow Greenberg to amend, the error would not have been prejudicial and would not constitute a ground for reversal. In the instant case, Greenberg's new claim involved an entirely new set of operative facts and a new theory of law. The new claim consequently could be asserted in an independent

action, and could not be barred by the trial court's refusal to allow amendment, as the trial court's decision on the original claim would have no res judicata effect. As the new Robinson-Patman Act claim did not affect the merits of the original contract claim, the trial court's decision on the merits of the contract claim cannot be reversed and remanded to the trial court. Further, it is not necessary to reverse and remand this case to the trial court for determination of the Robinson-Patman claim alone, because Greenberg has always been able to assert that claim by commencing a new action. Thus, Greenberg has not been injured in any way by the trial court's denial of the motion to amend.

As a side issue, Greenberg contends that Merrill Lynch resisted discovery proceedings so extraordinarily that Greenberg could have raised the new issues

sooner. (Greenberg's petition pages 12, 13) This argument was urged at both the trial court level and on appeal, and was not found to have any basis in fact.

III

CONCLUSION

Merrill Lynch respectfully submits that Greenberg's petition for writ of certiorari should be denied, in that:

1. Greenberg's petition requests a review of the decisions of the two courts below on an issue of fact, not law, and this court, as a court of law, will not undertake to review concurrent findings of fact by the two courts below.

2. Greenberg's argument with respect to exemplary damages and denial of

motion to amend does not present any ground for reversal.

Respectfully submitted,

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